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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. 4361

petition not printed

FRANK EGAN,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, and CLINTON T. DUFFY, Warden, et al.,
Respondents.

RESPONDENTS' ANSWER TO APPLICATION FOR WRIT OF CERTIORARI.

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... Printing Co., San Francisco, California

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PROCEEDINGS.

The history of the proceedings taken by Egan in the state Courts of California which led to his conviction for the murder of Jessie Scott Hughes, as an accomplice with Albert Tinnin and Verne Doran, and his various attempts to secure his release on *habeas corpus* proceedings in the state Courts and in this Court, may be found in a proceeding on *certiorari* now pending in this Court entitled "Frank Egan v.

State of California, No. 370" where he sought unsuccessfully in the state Court to set aside the indictment under which he was convicted and the judgment of conviction, and in the opinions and decisions of the District Court of Appeal and in the State Supreme Court as follows:

People v. Tinnin, 136 Cal. App. 301 (28 Pac. (2d) 951);

People v. Egan, 135 Cal. App. 479 (27 Pac. (2d) 412);

In re Egan, 24 Cal. (2d) 323 (149 Pac. (2d) 693);

People v. Egan, 73 A.C.A. 996 (167 Pac. (2d) 766).

We shall here confine our narrative to the instant proceeding and to a prior voluminous petition on *habeas corpus* filed in the State Supreme Court of California which proved adverse to Egan (*In re Egan,* 24 Cal. (2d) 323 (149 Pac. (2d) 693), decided June 5, 1944) and in this Court where a writ of *certiorari* was denied. (*Egan v. California,* 65 S. Ct. Rep. 272, decided December 4, 1944.)

This prior petition was filed in the State Supreme Court February 2, 1942 by Egan and his accomplice, Albert Tinnin, to secure their discharge from imprisonment on the theory their conviction was secured by a violation of their constitutional rights and privileges. This petition contained some ninety-eight typewritten pages to which there were annexed a number of lengthy affidavits. In due course writs were issued and a reference granted and Edward I.

Butler, Superior Judge of Marin County, was appointed referee to take testimony on three issues which were substantially as follows: (a) whether any perjured testimony was knowingly introduced against Egan and Tinnin by any witness material to the issue; (b) if so, whether such testimony was knowingly suffered by any state or prosecuting official; (c) whether Egan was unlawfully deprived of counsel during his trial.

The oral testimony before the referee consisted of some 555 pages and some 130 pages on oral interrogatories in a foreign deposition by stipulation of the parties. The findings of the referee were adverse to petitioners.

Exceptions were taken to these findings in the State Supreme Court by petitioner which were argued and submitted on briefs. The Supreme Court also found adversely to petitioners. The writs were discharged and the prisoners were remanded to custody. (*In re Egan,* 24 Cal. (2d) 323 (149 Pac. (2d) 693), where a fuller statement of the facts appear.) *Certiorari* was denied by this Court as above indicated (*Egan v. California,* 65 S. Ct. Rep. 272.) On page 15 of the instant petition on *certiorari* in this Court, petitioner makes the following statement:

> "* * * *that in February, 1942 petitioner again petitioned the Supreme Court of the State of California for a writ of habeas corpus, a hearing was granted and some two years later the Court making no mention of the grounds herein urged,* held that petitioner did not establish that he was convicted upon perjured testimony knowingly

used by the prosecuting authorities, and, that it was not established that petitioner was substantially deprived of his right to the assistance of counsel, *In re Egan*, 24 Cal. 2d 323, and this Honorable Court denied certiorari therefrom, Egan v. California, 65 S. Ct. 272; * * *" (Italics ours.)

To be more accurate, the referee found, and the Supreme Court decided, there was no evidence of the introduction of any perjured testimony against either Egan or Tinnin by any witness, which necessarily answered the second inquiry put to the referee in the negative to the effect no perjured testimony was introduced within the knowledge of any of the officials.

Thus, it is said the same issues presented in the instant proceeding were presented in the prior petition but not passed upon by the State Supreme Court. Our reply is that no motion was made before the State Supreme Court to refer these issues to the referee, nor was any request made for their consideration by the State Supreme Court. No evidence or testimony was offered or introduced in support of these issues either before the referee or the State Supreme Court. By all reasonable indications they had been abandoned by petitioners. Under these circumstances we do not believe they can be now again urged in this Court.

THE GROUNDS ASSIGNED WHICH IT IS ASSERTED GIVE THIS COURT JURISDICTION.

From what we can gather from his petition, the jurisdiction of this Court is based upon the denial of due process in violation of the Fifth and the Fourteenth Amendments to the *Federal Constitution.* It is needless to urge that the Fifth Amendment has no application to state procedure.

Feldman v. United States, 322 U. S. 487, 490, 491 (88 L. Ed. 1408);
Barron v. Baltimore, 32 U. S. (7 Peters) 242.

The sole ground assigned, therefore, if this Court is to assume jurisdiction is based upon the violation of the Fourteenth Amendment, which as far as we can ascertain from the petition is based upon the following facts:

1. That the indictment under which petitioner was convicted is void because:

(a) It was issued upon the uncorroborated testimony of Doran, a co-defendant and accomplice, in violation of his constitutional rights and privileges;

(b) The suppression of favorable and impeaching evidence both before the Grand Jury and in the trial of the case.

2. That petitioner's conviction was secured by a coercive confession (of Doran) obtained under the promise of immunity.

3. That petitioner was prevented from securing a fair and impartial trial through the interest, bias and prejudice of the trial judge.

At this time we desire to direct the attention of this Court to the fact that the alleged facts in support of the issues above stated are based upon a number of extracts taken from the record of the trial Court and alleged press accounts and opinions which can merit no consideration. Nor can the extracts from the record appearing in the petition be considered in the absence of the full transcript of the testimony taken before the trial Court as a part of the record on this proceeding. However, if serious consideration is given them they, in our opinion, disclose no denial of due process under the Fourteenth Amendment to the *Federal Constitution.*

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED UPON WHICH THIS COURT MAY ASSUME JURISDICTION.

1. These questions involve state practice and procedure only and violate no state or federal statute, or constitutional guarantee.

Newman v. Gates, 204 U. S. 89 (51 L. Ed. 385);

Herndon v. Georgia, 295 U. S. 441, 443 (79 L. Ed. 1530);

Jacobi v. Alabama, 187 U. S. 133 (47 L. Ed. 106);

Thorington v. Montgomery, 147 U. S. 490 (37 L. Ed. 252);

McNulty v. California, 149 U. S. 645 (37 L. Ed. 882);

Central Vermont R. Co. v. White, 238 U. S. 507 (59 L. Ed. 1433);

Patterson v. Alabama, 294 U. S. 600 (79 L. Ed. 1082);

Vincent v. California, 149 U. S. 648 (37 L. Ed. 884).

(a) The precise question as to the necessity of the corroboration of the testimony of an accomplice in a state Court was recently held by this Court to be a matter solely of state concern which does not involve due process.

Lisenba v. California, 314 U. S. 219, 227 (86 L. Ed. 166).

And it was recently held by the Supreme Court of the State of California that CORROBORATION OF the testimony of an accomplice before the Grand Jury was unnecessary to support the return of an indictment. The State Supreme Court further held that Courts will not inquire into the sufficiency of the evidence before the Grand Jury if there is some evidence in support of the indictment.

Greenberg v. Superior Court, 19 Cal. (2d) 319, 321, 322 (121 Pac. (2d) 713).

And it has been held a state Court will not consider the competency of the evidence introduced before the Grand Jury nor that it was secured by leading questions.

People v. Best, 13 Cal. App. (2d) 606, 611 (57 Pac. (2d) 168);

Morehouse v. Superior Court, 124 Cal. App. 38 (12 Pac. (2d) 133).

(b) The charge that impeaching evidence favorable to petitioner was suppressed before the Grand

Jury is based upon the alleged failure of the prosecution to draw its attention to the understanding that the prosecution had with Doran to the effect that if he testified truthfully to the facts in the trial of the case an effort would be made to secure clemency or immunity for him as petitioner's accomplice from the trial Court. This issue also involves a question of state procedure and does not present a substantial federal question where free from the taint of corruption, as in the instant case. A similar transaction was involved before this Court in *Lisenba v. California,* 314 U. S. 219, 227 (86 L. Ed. 166), where it was held that it did not involve due process where there is no evidence of a corrupt bargain, and in the instant case there was no evidence of a corrupt bargain. Under the circumstances it presents a matter of local concern and of common usage. Indeed, no authority has been cited showing the necessity of its disclosure before the Grand Jury.

2. The charge that the alleged confession of Doran was coercive is not borne out by the studiously selected extracts taken from the record of the trial Court, appearing in the petition. And in his attempt to show coercion petitioner has gone beyond the record under the facts alleged in the petition. There is no evidence pointed out in the record, and none exists, showing Doran's probation on a conviction of burglary was set aside, and sentence imposed, by reason of his refusal to confess and implicate petitioner. Indeed, it was the duty of the trial judge to set aside Doran's probation and impose sentence for the term prescribed by law, which is the maximum, upon information of his

participation in the murder of Jessie Scott Hughes. Moreover, the performance of a legal duty by a judicial officer cannot be deemed such force or coercion as would taint a confession. Motive under the circumstances, if any, is therefore utterly immaterial. Nor did the promise by the District Attorney to apply to the trial judge for clemency or immunity for Doran in consideration of his testifying to the truth of the matter in the trial of petitioner, constitute a corrupt bargain. A similar promise was considered by this Court in *Lisenba v. California,* 314 U. S. 219, 227 (86 L. Ed. 166). At page 227 this Court said in this connection:

> "The Fourteenth Amendment does not forbid a state court to construe and apply its laws with respect to the evidence of an accomplice. *There is no adequate showing that there was a corrupt bargain with Hope, and the practice of taking into consideration, in sentencing an accomplice, his aid to the State in turning state's evidence can be no denial of due process to a convicted confederate.* Hope's affidavits not only were prepared after the State Supreme Court had passed upon the case and its opinion had been published but after the lapse of nearly three years from the trial. They could, therefore, be considered only in the *habeas corpus* case. The State contends that it had no opportunity to answer them. This is contested by the petitioner. In any event, it was stipulated that the record on appeal in the other case should be part of the record on the *habeas corpus* hearing; and comparison of the testimony at the trial with the allegations of the affidavits raises serious doubts as to their truthfulness. The appraisal of the conflicting evidence

was for the court below. Even if its refusal to believe Hope's depositions were erroneous, the error would be no more a denial of due process than was its approval, on appeal, of the trial judge's refusal to direct a verdict on the ground of insufficiency of evidence." (Italics ours.)

On the hearing before the referee in the prior proceeding to determine whether perjured testimony was introduced during the trial of the case, Doran on several occasions persistently and emphatically testified before the referee that his testimony at the trial was the truth. We assume the record of these proceedings was a part of the record before this Court in the proceeding on *certiorari*. (*Egan v. California*, 65 S. Ct. Rep. 272.) Moreover, we are not here concerned with any confession of Doran. It was not mentioned or introduced in the record at the trial by the prosecution and consequently could play no part in the trial or conviction of Egan.

The statement of petitioner in paragraph XXV of his petition to the effect that Doran *related his confession at the trial*, is, of course, inaccurate, from the sense his confession was introduced in the evidence. He testified at the trial as a witness for the state under oath and under the protection of the trial Court to the facts without reference to any alleged confession. Even if a confession by Doran was introduced in the evidence and that it was involuntary, which we deny, it was nullified by the fact he took the stand as a witness.

People v. McLachlan, 13 Cal. (2d) 45, 51 (87 Pac. (2d) 825).

The authorities cited by petitioner in said paragraph of his petition, beginning with *Ashcraft v. Tenn.*, 322 U. S. 143, and ending with *People v. Williams,* 20 Cal. (2d) 237, plainly have no application. In those cases the confessions were given through fear and violence, which were undisputed, and they were introduced in the evidence at the trial where they were challenged by the parties making the confessions, which presents an entirely different situation.

We may add that out of fairness to the petitioner the District Attorney, both in his opening statement and his closing argument to the jury, fully apprised it of the understanding he had with Doran, which was simply to the effect application would be made to the trial judge for clemency or immunity in the event he testified to the truth of the facts. (R. 29-30.) And the fact that the trial judge permitted Doran to withdraw his plea of not guilty to the charge of murder and enter a plea of guilty to a charge of manslaughter shows the decision rested with the trial judge, who it is not claimed made any advance promise.

3. Under paragraph IV (R. 2) it is charged petitioner was deprived of a fair and impartial trial through the interest, bias and prejudice of the trial judge. Petitioner points to no evidence in the record in support of his contention showing any undue personal interest on the part of the trial judge against him during the trial of the case.

Tumey v. Ohio, 273 U. S. 510 (71 L. Ed. 749), cited by him, simply condemns a pecuniary interest in

the trial judge against defendant. In that case the mayor of a small Ohio village acted as a judge in prohibition cases. Part of his salary was fees collected on convictions only. However, where in a similar case the mayor did not retain any part of the fines imposed as payment of his services, it was held not to constitute such interest as would result in the denial of due process.

Dugan v. Ohio, 277 U. S. 61 (72 L. Ed. 784).

The interest, therefore, which would constitute a denial of due process is a financial interest, which petitoner does not claim that the trial judge had in his conviction. Nor is there any evidence of bias or prejudice on the part of the trial judge pointed out by petitioner. On pages 11 and 12 of his record before this Court reference is made to the transcript of the testimony taken at the trial where petitioner sought to secure possession of an alleged extrajudicial statement or confession of Doran made before the trial, which is also referred to as the suppression of evidence by the trial Court. If such a statement existed it was not introduced in the evidence by the prosecution or used in any way by it. Hence petitioner was not entitled to it, and under such circumstances the trial judge so advised petitioner. (R. 724.)

The charge that the trial Court denied petitioner the right to the process of the Court to compel the attendance of witnesses is also utterly without foundation since a review of the record of the trial Court (page 261), referred to by petitioner, will show the

trial judge indicated he would make the order for subpoenas, and there is nothing to indicate that the order was not made nor the witnesses were not called and testified.

CONCLUSION.

It is submitted that the petition presents no substantial federal question for review by this Court. The petition of Frank Egan should be dismissed, and we accordingly hereby make a motion for its dismissal.

Dated, San Francisco, California,
September 11, 1946.

Respectfully submitted,

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